United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 27, 2007

TO : Joseph Barker, Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Wackenhut Corporation 177-3950-9000
Cases 13-CA-43982-1 & 13-CA-13983-1 339-7575-7550
339-7575-7575

The Region submitted these cases for advice as to whether the Employer could lawfully withdraw recognition from and refuse to bargain with a mixed-guard Union upon the expiration of the parties' collective-bargaining agreement.

We conclude that under settled Board precedent, the Employer was entitled to withdraw recognition from and refuse to bargain with the Union upon the expiration of the agreement. The Region should therefore dismiss the charge, absent withdrawal.

FACTS

Wackenhut Corporation (the Employer) provides guard services to commercial buildings throughout Chicago. It voluntarily recognized Service Employees International Union Local 1 (Local 1) and has maintained a collective bargaining relationship with Local 1 for at least nine years. The parties' most recent agreement was due to expire on April 30, 2007.[1]

On January 25th and April 23rd, Local 1 sent letters to the Employer requesting an extension of the contract to facilitate negotiations between Local 1 and BOMA.[2] The Employer did not respond to either request.

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[1] All dates are 2007, unless otherwise noted.

[2] The Employer was a signatory employer to the Security Contract master agreement between Local 1 and BOMA.

On April 30th, the parties' contract expired. On that day, the Employer's attorney contacted Local 1's pension fund administrator asking if the company had fully funded its pension contributions. On May 2nd, Local 1 became aware through its members that employees had received information regarding new healthcare benefits, requiring them to fill out enrollment forms in order to keep receiving their benefits. The employees were also told that because the collective bargaining agreement had expired, union dues would no longer be deducted from their paychecks.[3]

Finally, on May 29th, Local 1 received the following email from the Employer:

> As per previous notice[4] and the expiration of the BOMA/SEIU agreement on April 30, 2007, The Wackenhut Corporation no longer recognizes SEIU as a representative for any of our employees. Please discontinue sending any payroll audit requests and invoicing for pension trust, health and welfare benefits, joint security officer training fund, and COPE.

Local 1 alleges that the Employer refused to bargain, unilaterally made changes in the employees' benefits, and withdrew recognition from the Union in violation of Section 8(a)(5).

ACTION

We conclude that under settled Board law, the Employer lawfully withdrew recognition from Local 1 upon the expiration of the parties' collective-bargaining agreement. The Region should therefore dismiss the charge, absent withdrawal.

Section 9(b)(3) of the Act prohibits the Board from deciding that a mixed unit of guards and non-guards is appropriate for bargaining, and from certifying a guard/non-guard union as the representative of a guards-only unit. In Wells Fargo, the Board interpreted Section

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[3] The Region confirmed that none of these changes took place until after the expiration of the agreement on April 30.

[4] The previous notice referred to by the Employer is an article that was published on May 7th in a college newspaper, where both Local 1 and Employer representatives are quoted speaking about the Employer's April 30th withdrawal of recognition from Local 1.

9(b)(3) as giving effect to Congress' clear purpose: protecting employers from the potential conflicting loyalties that arise from the guard union's representation of nonguard employees, or the union's affiliation with other unions that represent nonguard employees.[5] Because these potential conflicts of loyalty would occur whether a mixed-guard union was certified or not, the Board has refused to compel employers to bargain if the result would "saddl[e] the employer with an obligation to bargain [that] presents it with the same set of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid."[6] Thus, in Wells Fargo, the Board allowed the employer to withdraw recognition from a mixed-guard union upon the expiration of a collective-bargaining agreement.[7]

On enforcement, the Second Circuit examined the language and legislative history of Section 9(b)(3) and affirmed the Board's decision in Wells Fargo, holding that an employer's decision to voluntarily recognize a mixed-guard union is not "forever binding."[8] The court reasoned that the statutory prohibition against Board certification was evidence that Congress disfavored bargaining relationships between employers and mixed-guard unions.[9] The court noted that there "is sufficient support for the Board's conclusion that in enacting the statute, Congress knowingly decreased the stability of [such] relationships in order to further its objective of protecting employers from the potential for divided loyalty."[10]

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[5] See, e.g., Wells Fargo, 270 NLRB 787, 789 (1984), enfd. sub nom. Teamsters Local 807 v. NLRB, 755 F.2d 5 (2d Cir. 1985), cert. denied 474 U.S. 901 (1985).

[6] Wells Fargo, above, 270 NLRB at 789.

[7] See id. at 787-88.

[8] Teamsters Local 807 v. NLRB, 755 F.2d at 10 (the court, however, affirmed the principle that employers are not free to withdraw recognition from mixed-guard unions during the life of a contract).

[9] Id. at 9.

[10] Id. at 10.

The Board later applied the same rationale in Temple Security and held that the employer lawfully withdrew recognition from the union after the termination of the collective-bargaining agreement.[11] In enforcement proceedings, the Seventh Circuit recognized that Section 9(b)(3) balances employers' property interests and the "importance of stability in collective bargaining agreements."[12] However, the court disagreed with the Board majority and, effectively following the dissent's rationale, held that the employer waived its Section 9(b)(3) right to avoid a bargaining relationship with the union when it voluntarily recognized it.[13] Thus, the court held that voluntarily recognized mixed-guard unions, even though uncertifiable, were protected by Section 8(a)(5)'s duty to bargain, regardless of whether the parties had a collective-bargaining agreement.[14]

The Board, as recently as 2004, reaffirmed its adherence to Wells Fargo and to the Second Circuit's view that the forced continuation of a relationship between an employer and a mixed guard union is contrary to the letter and spirit of Section 9(b)(3).[15] In Northwest Protective Service, the Board applied Wells Fargo over the contrary view set forth by the dissenters and Seventh Circuit in Temple Security and found that an employer of guards lawfully withdrew recognition from and refused to bargain with a union upon expiration of the parties' collective-bargaining agreement after the union become a mixed-guard union through a union affiliation.[16] Thus, the Board's reaffirmance of Wells Fargo, that an employer may withdraw recognition from a voluntarily recognized mixed-guard union

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[11] Temple Security, Inc., 328 NLRB 663, 665 (1999), enf. denied sub nom. General Service Employees, Local 73 v. NLRB, 230 F.3d 909 (7th Cir. 2000), supp. decision 337 NLRB 372 (2001).

[12] General Service Employees, 230 F.3d at 916.

[13] Id. at 915, 916.

[14] The Board on remand applied the Seventh Circuit's rationale as the law of the case. Temple Security, Inc., 337 NLRB 372 (2001).

[15] Northwest Protective Service, 342 NLRB 1201 (2004).

[16] Id. at 1201, 1203, n.13.

upon the expiration of a collective-bargaining agreement, amounts to a rejection of the contrary views espoused by the dissenters and Seventh Circuit in Temple Security.

Here, the parties' collective-bargaining agreement expired on April 30. Because the Employer was under no obligation to extend the contract beyond its term, the Employer's silence to the Union's January 25th and April 23rd requests to do so did not amount to a refusal to bargain. Under the clear and consistent Board precedent analyzed above, the Employer's withdrawal of recognition, which occurred after the expiration of the parties' agreement, did not violate Section 8(a)(5).

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K